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The Rise and Fall of Crossmann: The South Carolina Supreme Court's Double Take on Whether a CGL Insurance Policy Covers Progressive Property Damage Resulting from Faulty Workmanship

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THE RISE AND FALL OF *CROSSMANN*: THE SOUTH CAROLINA SUPREME COURT'S DOUBLE TAKE ON WHETHER A CGL INSURANCE POLICY COVERS PROGRESSIVE PROPERTY DAMAGE RESULTING FROM FAULTY WORKMANSHIP

I. INTRODUCTION

Before the ink dried on the South Carolina Supreme Court's January 2011 decision in *Crossmann Communities of North Carolina, Inc. v. Harleysville Mutual Insurance Co.*,[1] many involved in the construction industry, alarmed by the court's opinion, were calling for a rehearing of the case as well as a legislative response to counteract its holding.[2] The court ruled, in effect, that the standard liability insurance policy that general contractors purchase for construction projects would not cover property damage resulting from their subcontractors' "faulty workmanship"[3] except in the most unexpected and accidental situations.[4] Thus, general contractors who had previously relied on these insurance policies to manage their risk of defective construction for a project would now potentially become exposed to greater liability for property damage claims that occurred as a result of their subcontractors' negligent workmanship.[5]

A. *An Introductory Look at* Crossmann

The *Crossmann* litigation arose a few years after the completion of a Myrtle Beach condominium project, when homeowners discovered numerous construction defects that caused "substantial decay and deterioration" of the individual units.[6] The supreme court held that the insurance company was not required to indemnify under the commercial general liability (CGL) policy it had issued to the project's general contractor because the property damage was not the result of an "occurrence," as required by the CGL policy.[7] According to the court, the subcontractor's faulty workmanship that led to "damage [that] was

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1. *(Crossmann I)*, No. 26909, Shearouse Adv. Sh. No. 1 at 32 (S.C. Jan. 7, 2011), *available at* http://www.sccourts.org/opinions/advSheets/no12011.pdf, *withdrawn*, 395 S.C. 40, 717 S.E.2d 589 (2011).

2. *See* Ashley Fletcher Frampton, *S.C. Court Ruling Leaves Contractors on the Hook for Negligence*, CHARLESTON REGIONAL BUS. J. (Feb. 14, 2011), http://www.charlestonbusiness.com/news/38364-s-c-court-ruling-leaves-contractors-on-the-hook-for-negligence; *Plot Thickens in South Carolina Builders Liability Brouhaha*, COASTAL CONTRACTOR ONLINE, http://www.coastalcontractor.net/article/469.html (last visited Mar. 7, 2012); *see also* Fred Horlbeck, *Defects Covered? No, Says the Supreme Court in Its Latest CGL Coverage Decision*, S.C. LAW. WKLY. (Jan. 14, 2011, 3:41 PM), http://sclawyersweekly.com/news/2011/01/14/defects-covered-no-says-the-supreme-court-in-its-latest-cgl-coverage-decision/.

3. *See Crossmann I*, Shearouse Adv. Sh. No. 1 at 45. Faulty workmanship is neither a legally defined term nor defined in insurance policies.

4. *See id.* at 46–47; Melissa M. Nichols, Crossmann II: *A Final Consensus on "Occurrence" and New Allocation Rules for Insurers*, 39 DEF. LINE, Fall 2011, at 27, 27, *available at* http://scdtaa.com/Resources/Documents/DefenseLine_Vol%2039_3.pdf.

5. *See* Frampton, *supra* note 2.

6. *Crossmann I*, Shearouse Adv. Sh. No. 1 at 33.

7. *Id.* at 49–50.

progressive in nature"[8] did not satisfy the occurrence requirement because it did not constitute a fortuitous accident, but instead, caused the natural and expected consequences of negligent construction.[9] Although the contractor argued that the policy's occurrence definition encompassed a broader scope of accidents that included events such as a continuous exposure to water infiltration or termite infestation, the court disagreed, reading a strict fortuity element into the definition, despite the presence of language that suggested otherwise.[10]

The court's failure to follow what was thought to be established precedent threatened to create unpredictability in the construction community and immediate anxiety for many legal practitioners.[11] Following an outcry over the decision, the court agreed to rehear the case and received a number of amicus curiae briefs, reflecting a widespread concern with the implications of CGL coverage for property damage caused by a subcontractor's faulty workmanship.[12] Eight months later, the court withdrew its initial decision (*Crossmann I*) and filed a new opinion (*Crossmann II*), holding that the insured's CGL policy covered the property damage to the condominium units because the occurrence definition was ambiguous and therefore must be construed against the insurer.[13] The court's reversal in *Crossmann II* epitomizes the complexity of the occurrence issue, which the court itself deemed "an intellectual mess."[14]

This Note analyzes the court's reasoning in reaching its two different conclusions regarding whether a subcontractor's faulty workmanship that causes property damage constitutes an occurrence within the meaning of the CGL policy. Part II discusses the development of the standard CGL policy and provides a background on South Carolina's construction insurance jurisprudence. Of particular importance is the South Carolina Supreme Court's analysis of the CGL policy's occurrence requirement in *L-J, Inc. v. Bituminous Fire & Marine Insurance Co.*[15] and *Auto Owners Insurance Co. v. Newman.*[16] Parts III and IV detail the facts, procedural history, and opinions rendered in *Crossmann I* and *Crossmann II*. Part V argues that, by pivoting in *Crossmann II* to find coverage under the insured's CGL policy, the court reached the correct result. Crossmann's position, that property damage caused by faulty

8. *Id.* at 34. A progressive injury is defined as "an injury that results from an event or set of conditions that occurs repeatedly or continuously over time, such as long-term exposure to asbestos fibers or the continual intrusion of water into a building." Crossmann Cmtys. of N.C., Inc. v. Harleysville Mut. Ins. Co. (*Crossmann II*), 395 S.C. 40, 51 n.8, 717 S.E.2d 589, 595 n.8 (2011).

9. *Crossmann I*, Shearouse Adv. Sh. No. 1 at 47.

10. *See id.* at 33–34 & n.1, 46, 49.

11. *See* Nichols, *supra* note 4, at 27.

12. *See* Ashley Fletcher Frampton, *Legislature Passes Bill Reinstating Coverage for Faulty Work*, CHARLESTON REGIONAL BUS. J. (MAY. 13, 2011), http://www.charlestonbusiness.com/news/39625-legislature-passes-bill-reinstating-coverage-for-faulty-work?rss=0.

13. *Crossmann II*, 395 S.C. at 47, 717 S.E.2d at 593.

14. *Crossmann I*, Shearouse Adv. Sh. No. 1 at 37.

15. 366 S.C. 117, 621 S.E.2d 33 (2005).

16. 385 S.C. 187, 684 S.E.2d 541 (2009).

workmanship satisfies the occurrence requirement, was reasonable based on the language of the occurrence definition, precedent, and other jurisdictions' treatment of this issue. In addition, Part V considers the implications of the case and the effect of a statute passed to negate the *Crossmann I* opinion. Finally, Part VI concludes that *Crossmann II* has partially unraveled the "intellectual mess" surrounding CGL coverage disputes in construction defect cases.

II. BACKGROUND

A. *"Modern construction [is] a dangerous business . . . ."*[17]

CGL insurance is the most prevalent source of liability protection used by general contractors in the construction industry.[18] Accidents in the course of, and in the aftermath of, the construction process are common and often inevitable, even when dealing with the most talented and professional developers and contractors.[19] The claims that occur in this construction context "frequently lead to coverage disputes under CGL policies, and such disputes can be complex and costly to resolve."[20]

In existence since the 1940s,[21] the standard CGL policy has undergone several modifications; however, it has always contained some version of the "your work" exclusion.[22] This exclusion, which is "commonly at issue in construction defect cases," essentially provides that the insurance agreement will not cover an insured contractor's own work.[23] Thus, with regard to construction defect claims, generally "[n]o [CGL] coverage is owed for damage solely to the insured's completed work product."[24] Perhaps the most significant change to the CGL policy was the adoption, in 1986, of the "subcontractor exception" to the your work exclusion.[25] The subcontractor exception provides that the your work exclusion does not apply where the property damage in question is caused by a subcontractor's faulty workmanship.[26] "The exception was a concession by the insurance industry that the general contractor is unable to monitor and control all the work of subcontractors, and that property damage arising out of such work is

17. Lee H. Shidlofsky & Patrick J. Wielinski, *Commercial General Liability Coverage, in* CONSTRUCTION INSURANCE: A GUIDE FOR ATTORNEYS AND OTHER PROFESSIONALS 67, 67 (Stephen D. Palley et al. eds., 2011).

18. *Id.*

19. *Id.*

20. *Id.*

21. Crossmann Cmtys. of N.C., Inc. v. Harleysville Mut. Ins. Co. (*Crossmann I*), No. 26909, Shearouse Adv. Sh. No. 1 at 36 (S.C. Jan. 7, 2011).

22. *Id.*

23. Shidlofsky & Wielinski, *supra* note 17, at 89.

24. RANDY MANILOFF & JEFFREY STEMPEL, GENERAL LIABILITY INSURANCE COVERAGE: KEY ISSUES IN EVERY STATE 225 (2011).

25. *See* Auto Owners Ins. Co. v. Newman, 385 S.C. 187, 195, 684 S.E.2d 541, 545 (2009).

26. Shidlofsky & Wielinski, *supra* note 17, at 89.

more fortuitous than work that a general contractor performs directly."[27] Because subcontractors often perform the majority of the work on construction projects,[28] the exception greatly narrows the your work exclusion, "often preserv[ing] coverage for insureds."[29]

Before the your work exclusion—or any other policy exclusion or exception to an exclusion—can take effect, there must be an initial grant of coverage under the CGL policy's insuring agreement.[30] The standard insuring agreement provides broad coverage.[31] A standard agreement provides in part:

> We will pay those sums that the insured becomes legally obligated to pay as damages because of . . . "property damage" to which this insurance applies.
>
> . . . .
>
> This insurance applies to . . . "property damage" only if:
>
> (1) The "property damage" is caused by an "occurrence" that takes place in the "coverage territory"; [and]
>
> (2) The . . . "property damage" occurs during the policy period.[32]

As defined in the standard policy, an "occurrence" is "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."[33] This definition is a modification of the traditional "strict accident formulation," in which an occurrence was simply defined as an "accident."[34] Although the word accident has always gone undefined in the CGL policy, South Carolina courts have found it to mean: "[A]n unexpected happening or event, which occurs by chance and usually suddenly, with harmful result, not intended or designed by the person suffering the harm."[35] This definition of an occurrence seemingly "incorporates the requirement of *fortuity*, which is part and

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27. *Id.*

28. *See* Shidlofsky & Wielinski, *supra* note 17, at 89 (explaining that contractors rarely self-perform work); Max Fiester & Joseph H. Langerak IV, *Interpretations of "Property Damage" and "Occurrence,"* FOR THE DEF., Nov. 2009, at 20, 20–21, *available at* http://dritoday.org/ftd/2009-11F.pdf.

29. Shidlofsky & Wielinski, *supra* note 17, at 89, 90. It is important to note that the subcontractor exception does not grant coverage, it simply reinstates coverage that the your work exclusion took away. *See id.* at 89.

30. *See* David Dekker et al., *The Expansion of Insurance Coverage for Defective Construction*, CONSTRUCTION LAW., Fall 2008, at 19, 20.

31. *Id.*

32. Shidlofsky & Wielinski, *supra* note 17, at 69 (alteration in original).

33. *Id.* at 72 (internal quotation marks omitted).

34. *Id.*

35. Auto Owners Ins. Co. v. Newman, 385 S.C. 187, 192, 684 S.E.2d 541, 543 (2009) (quoting Green v. United Ins. Co. of Am., 254 S.C. 202, 206, 174 S.E.2d 400, 402 (1970)) (internal quotation marks omitted).

parcel of the basic tenet of insurance that an insured should not be able to control the risk and obtain insurance coverage for intentional acts."[36]

Because of the addition of the "continuous or repeated exposure to substantially the same general harmful conditions" language in 1986,[37] the current definition purportedly enlarges the scope of what qualifies as an accident within the meaning of occurrence.[38] This expanded definitional language has created problems in construction related property damage claims because courts have found it difficult to reconcile this modern occurrence language with the fortuity element inherent in all liability insurance policies.[39] For example, in a "typical [fact] pattern," an insured general contractor constructs a residential or commercial building, "employ[ing] various subcontractors to assist with the completion of the project."[40] After completion of the project, the "owner discovers defects in the construction—such as defectively installed windows that are now leaking or an improperly poured foundation that is causing the building to shift."[41] The subcontractor performed the negligent work, and the issue arises whether the insured's CGL policy will provide coverage for the resulting damages.[42] In determining whether the damage to the building—caused by a period of prolonged water seepage—resulted from an occurrence, there exists a tension between the arguable lack of a fortuitous event and the application of the "continuous or repeated exposure to substantially the same general harmful conditions" phrase.[43] This tension is at the heart of the *Crossmann* decisions.

The key aspect of the occurrence requirement is the fortuity concept, which provides that there is no insurance for damage "expected or intended from the standpoint of the insured."[44] CGL policies are not designed to protect against the "risks that are the normal, frequent, or predictable consequences of doing business."[45] Although the business risk language now exists as its own policy exclusion, because it was originally incorporated in the occurrence prong of the CGL insuring agreement, "issues relating to the fortuity of . . . property damage arising out of construction risks are usually determined by reference to the

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36. Shidlofsky & Wielinski, *supra* note 17, at 72 (emphasis added).

37. *See id.* (explaining the history of the definition of occurrence).

38. *See id.*

39. *See* SHIDLOFSKY & WIELINSKI, *supra* note 17, at 80; *see also* Philip W. Savrin & Todd H. Surden, *The Evolving Scope of the Occurrence Requirement*, FOR THE DEF., June 2009, at 42, 42, *available at* http://dritoday.org/ftd/2009-06F.pdf ("It is a generally accepted principle of liability insurance law that policies respond to fortuitous events only.").

40. MANILOFF & STEMPEL, *supra* note 24, at 221.

41. *Id.*

42. *See id.*

43. Shidlofsky & Wielinski, *supra* note 17, at 72.

44. *Id.* (internal quotation marks omitted).

45. Century Indem. Co. v. Golden Hills Builders, Inc., 348 S.C. 559, 565, 561 S.E.2d 355, 358 (2002) (quoting ROWLAND H. LONG, THE LAW OF LIABILITY INSURANCE § 10.01[1] (2001)) (internal quotation marks omitted).

occurrence requirement."[46] Complicating the analysis of negligent or defective construction claims is the fact that a subcontractor's work is usually performed intentionally; however, the subcontractor rarely intends or expects the consequential damages resulting from such an intended performance.[47] While some courts focus on the subcontractor's act itself, to exclude from coverage any damage caused by faulty workmanship,[48] other courts "focus . . . on whether the *outcome* was intended by the actor."[49] Jurisdictions following the former approach interpret the word accident narrowly to require "unintentional conduct by the insured"[50] or the intervention of an external force.[51] Jurisdictions that adhere to the latter approach interpret the word accident broadly to include events that the insured contractor does not expect,[52] "reject[ing] foreseeability as the boundary between accidental and intentional conduct."[53]

In addition to the requirement that the accident result from an occurrence, the claim must also allege the existence of property damage. As defined in the standard CGL policy, "property damage" consists of "[p]hysical injury to tangible property, including all resulting loss of use of that property."[54] Although the property damage requirement has not been as contentious as the occurrence requirement in construction defect litigation, it is important to keep the two requirements distinct. It is sometimes incorrectly assumed that either property damage itself evidences an occurrence or that the existence of property damage is contingent on the finding of an occurrence.

B. South Carolina Jurisprudence on the "Occurrence" Requirement

Like other jurisdictions around the country, South Carolina has wrestled with whether CGL policies cover property damage claims resulting from

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46. Shidlofsky & Wielinski, *supra* note 17, at 72. In *Auto Owners Insurance Co. v. Newman*, discussed *infra* Part II.B.2, the South Carolina Supreme Court stated that "an analysis . . . as to whether or not there was an 'occurrence' essentially subsumes" the business risk exclusion. 385 S.C. 187, 197 n.4, 684 S.E.2d 541, 546 n.4 (2009).

47. *See* Savrin & Surden, *supra* note 39, at 42.

48. *See, e.g.*, U.S. Fid. & Guar. Co. v. Omnibank, 812 So. 2d 196, 197 (Miss. 2002) ("[The] action must still be accidental and unintended in order to implicate policy coverage.")

49. *See* Savrin & Surden, *supra* note 39, at 44 (emphasis added).

50. *Id.* at 43.

51. *See* Joel R. Mosher, *Occurrences*, *in* THE REFERENCE HANDBOOK ON THE COMPREHENSIVE GENERAL LIABILITY POLICY 51, 63 (Alan Rutkin & Robert Tugander eds., 2010) [hereinafter REFERENCE HANDBOOK] (quoting *Omnibank*, 812 So. 2d at 200) (discussing case law that requires an external force for the accident to be considered an occurrence).

52. Savrin & Surden, *supra* note 39, at 45.

53. Shidlofsky & Wielinski, *supra* note 17, at 74 (citing Lamar Homes, Inc. v. Mid-Continent Cas. Co., 242 S.W.3d 1, 8 (Tex. 2007)).

54. Crossmann Cmtys. of N.C., Inc. v. Harleysville Mut. Ins. Co. (*Crossmann II*), 395 S.C. 40, 48, 717 S.E.2d 589, 593 (2011); Shidlofsky & Wielinski, *supra* note 17, at 77.

construction defects and faulty workmanship.[55] In *Crossmann I*, the supreme court examined two relatively recent South Carolina cases—*L-J, Inc. v. Bituminous Fire & Marine Insurance Co.* and *Auto Owners Insurance Co. v. Newman*—that depended upon an interpretation of the occurrence requirement.[56] As in *Crossmann*, in both of these cases the supreme court changed its original opinion, reflecting the difficulty in adjudicating construction related CGL coverage claims.[57] Nonetheless, the court's decisions in *L-J* and *Newman* are critical to understanding the issues presented in *Crossmann*.

1. L-J, Inc. v. Bituminous Fire & Marine Insurance Co.

a. Facts and Procedural History

In this 2005 case, the developer of a subdivision brought an action against a general contractor, alleging, *inter alia*, negligent construction of a road system.[58] Four years after subcontractors completed road construction, the subdivision's roads began "alligator cracking"—a deteriorated condition of distressed asphalt pavement.[59] The general contractor settled the underlying lawsuit for $750,000 and sought insurance coverage from its four insurers pursuant to its CGL policies.[60] Although three of its insurers provided insurance proceeds for the loss, Bituminous Fire & Marine Insurance Company (Bituminous) refused to recognize coverage.[61] This led the three paying insurance companies to file a declaratory judgment action seeking contribution and indemnification from Bituminous.[62] The circuit court delegated the action to a special master who found that the road damage constituted an occurrence and that Bituminous had a duty to provide coverage under its CGL policy.[63]

b. The South Carolina Supreme Court's Decision

On appeal, the issue before the supreme court was "whether property damage to the work product alone, caused by faulty workmanship, constitute[d] an occurrence."[64] In determining whether an occurrence existed, the court

55. Crossmann Cmtys. of N.C., Inc. v. Harleysville Mut. Ins. Co. (*Crossmann I*), No. 26909, Shearouse Adv. Sh. No. 1 at 38–39 (S.C. Jan. 7, 2011), *withdrawn*, 395 S.C. 40, 717 S.E.2d 589 (2011).

56. *Id.* at 42–44.

57. *See* Auto Owners Ins. Co. v. Newman, 385 S.C. 187, 190, 684 S.E.2d 542 (2009); L-J, Inc. v. Bituminous Fire & Marine Ins. Co., 366 S.C. 117, 119, 621 S.E.2d 33, 34 (2005).

58. *L-J*, 366 S.C. at 119, 621 S.E.2d at 34.

59. *Id.* at 122, 621 S.E.2d at 35–36.

60. *Id.* at 119, 621 S.E.2d at 34.

61. *Id.*

62. *Id.* at 120, 621 S.E.2d at 34.

63. *Id.*

64. *Id.* at 121, 621 S.E.2d at 35.

considered evidence[65] that the subcontractor's negligent design, preparation, and construction all contributed to the road deterioration.[66] This negligent work—which constituted the faulty workmanship—damaged only the roadway system, i.e., there was no property damage beyond the subcontractor's own defective work product.[67] And, faulty workmanship by itself, the court stated, is not "caused by an accident or by exposure to the same general harmful condition[]."[68] Accordingly, the court held that the faulty workmanship constituted a possible breach of contract for unsatisfactory work, not an occurrence within the meaning of the CGL policy.[69]

In reaching its decision, the court relied on the New Hampshire Supreme Court's opinion in *High Country Associates v. New Hampshire Insurance Co.*[70] In that case, the New Hampshire Supreme Court "held that a CGL provided coverage for property damage caused by continuous exposure to moisture when the complaint alleged negligent construction that resulted in property damage and not merely negligent construction damaging only the work product itself."[71] An occurrence existed, the New Hampshire court held, because the insured made a claim for damages that were caused by water seepage through negligently constructed walls—a claim beyond solely the repair of "the contractor's defective work."[72] In *L-J*, the South Carolina Supreme Court concluded that, unlike in the New Hampshire *High Country* case, the complaint in *L-J* alleged only the costs of repairing the faulty workmanship itself, which does not constitute an occurrence within the CGL policy.[73] According to the court, if the occurrence requirement had been satisfied on these facts, the court would have improperly converted the CGL policy into a performance bond.[74] As opposed to an insurance policy which indemnifies the cost of accidents, a performance bond is a financial guarantee that, if the contractor fails to adequately perform the construction project, a surety will step in and complete the work pursuant to the specifications of the underlying contract.[75] Finally, the court commented that its

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65. One expert witness testified that the subcontractor's failure to properly remove tree stumps and compact the wet clay in the subgrade created insufficient subgrade preparation. *Id.* at 122, 621 S.E.2d at 36. In addition, the poorly prepared thin road course contributed to the cracking. *Id.* Another expert testified that ill-designed drainage and curb-edge detail along with increased heavy traffic caused the damage. *Id.* at 122–23, 621 S.E.2d at 36.

66. *Id.* at 123, 621 S.E.2d at 36.

67. *Id.*

68. *Id.*

69. *Id.* at 124, 621 S.E.2d at 36.

70. *Id.* at 123, 621 S.E.2d at 36 (citing High Country Assocs. v. N.H. Ins. Co., 648 A.2d 474 (N.H. 1994)).

71. *Id.* at 123, 621 S.E.2d at 36 (citing *High Country*, 648 A.2d at 477).

72. *Id.* at 123–24, 621 S.E.2d at 36 (quoting *High Country*, 648 A.2d at 477) (internal quotation marks omitted).

73. *Id.* at 124, 621 S.E.2d at 36.

74. *Id.*

75. *Id.* at 124, 621 S.E.2d at 37.

holding would ensure "that ultimate liability falls to the one who performed the negligent work—the subcontractor—instead of the insurance carrier."[76]

2. Auto Owners Insurance Co. v. Newman

a. Facts and Procedural History

In this 2009 case, a homeowner brought a lawsuit against the builder of its recently constructed home, alleging that a subcontractor defectively installed stucco siding.[77] The homeowner alleged that this faulty workmanship allowed water intrusion to severely damage the home's wooden framing and exterior sheathing.[78] After the homeowner received a binding arbitration award, the homebuilder's insurance company filed a declaratory judgment action to determine whether it was required to cover the homebuilder's losses under the CGL policy it had issued.[79] The trial court found that the home's property damage was caused by an occurrence, and was thus covered under the homebuilder's policy.[80] The insurer appealed, arguing that the damage caused by the defective work was not the result of an occurrence because under *L-J*, a subcontractor's faulty workmanship alone "d[oes] not cause an 'accident' constituting an 'occurrence.'"[81]

b. The South Carolina Supreme Court's Decision

In approaching this question, the supreme court first looked at the definition of an occurrence as provided in the CGL policy.[82] "Occurrence" was defined as "an accident, including continuous or repeated exposure to substantially the same harmful conditions."[83] Because the policy did not provide a definition of an accident, the court quoted from a 1970 workplace injury case, in which the court described an accident within the meaning of an insurance contract as "[a]n unexpected happening or event, which occurs by chance and usually suddenly, with harmful result, not intended or designed by the person suffering the harm or

76. *Id.*

77. Auto Owners Ins. Co. v. Newman, 385 S.C. 187, 190, 684 S.E.2d 541, 542 (2009). A consulting engineer testified that the subcontractor "did not meet applicable building code requirements and deviated from industry standards" by failing to apply thick enough stucco, failing "to install a weep system or flashing around doors and windows," and failing to use proper "caulking and banding methods." *Id.* at 194 n.1, 684 S.E.2d 544 n.1.

78. *Id.* at 190, 684 S.E.2d at 542.

79. *Id.* at 190, 684 S.E.2d at 542–43.

80. *Id.* at 190–91, 684 S.E.2d at 543.

81. *Id.* at 191, 684 S.E.2d at 543.

82. *Id.* at 192, 684 S.E.2d at 543.

83. *Id.* (internal quotation marks omitted).

hurt."[84] The court then reviewed *L-J*, seizing upon a statement in that case that while faulty workmanship itself is not an accident, "a CGL policy may provide coverage where faulty workmanship causes . . . damage to other property besides the defective work product."[85] To understand this proposition, the court in *Newman* further analyzed the *High Country* opinion that *L-J* had relied on and that had similar facts to *Newman*.[86] In *High Country*, the owners of a number of condominium units alleged that, due to a subcontractor's negligent siding installation, continuous moisture seeped into the individual units causing "widespread decay of the interior and exterior walls and loss of structural integrity over a nine-year period."[87] The New Hampshire court found it significant that the claim was not merely to repair the defective siding itself—which would have been a claim for only faulty workmanship—but rather for damages to other property that resulted from the faulty workmanship.[88] According to the *High Country* court, an occurrence existed because the continuous moisture intrusion, allowed by the defective installation of siding, caused damage to the property beyond the defective siding itself.[89]

Viewing *High Country* through the lens of *L-J*, the court in *Newman* recognized the existence of property damage beyond the negligent work itself because the defectively installed stucco created the conditions necessary for the damage to the home's framing and exterior sheathing.[90] Therefore, the court said that the claim was not one merely to repair faulty workmanship.[91] Instead, the "continuous moisture intrusion" qualified as "'an unexpected happening or event' not intended by [the homebuilder]—in other words, an 'accident'—involving 'continuous or repeated exposure to substantially the same harmful conditions.'"[92] In support of its determination that the continuous water intrusion qualified as an accident, the court cited a Tennessee Supreme Court opinion for the proposition that "whether an 'accident' has occurred . . . requires a court to determine whether damages would have been foreseeable if the insured had completed the work *properly*."[93] Thus, the court held that the home's property damage was caused by an occurrence, and the CGL insurer was required to cover the homebuilder's losses.[94]

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84. *Id.* (alteration in original) (quoting Green v. United Ins. Co. of Am., 254 S.C. 202, 206, 174 S.E.2d 400, 402 (1970)) (internal quotation marks omitted).

85. *Id.* at 193, 684 S.E.2d at 544 (citing L-J, Inc. v. Bituminous Fire & Marine Ins. Co., 366 S.C. 117, 123 n.4, 621 S.E.2d 33, 36 n.4 (2005)).

86. *Id.* at 193–94, 684 S.E.2d at 544 (citing High Country Assocs. v. N.H. Ins. Co., 648 A.2d 474 (N.H. 1994)).

87. *Id.* at 193, 684 S.E.2d at 544 (citing *High Country*, 648 A.2d at 476).

88. *High Country*, 648 A.2d at 477.

89. *Id.* at 478.

90. *Newman*, 385 S.C. at 194, 684 S.E.2d at 544.

91. *Id.*

92. *Id.* at 194, 684 S.E.2d at 544–45.

93. *Id.* at 194, 684 S.E.2d at 545 (emphasis added) (citing Travelers Indem. Co. of Am. v. Moore & Assocs., Inc., 216 S.W.3d 302, 309 (Tenn. 2007)).

94. *Id.* at 194, 684 S.E.2d at 545.

The court swiftly rejected the insurer's argument that "because a construction professional would expect substantial moisture intrusion from defective stucco to result" in damage to the home, these damages were barred from coverage by the business risk exclusion.[95] According to the court, it was "unreasonable to believe that [the homebuilder] expected or intended its subcontractor to perform negligently," and thus, the homebuilder would not have expected or intended the damage to the home's framing and exterior sheathing.[96] In addition, even though the damage was to the insured's own project, the court noted that the your work exclusion did not prevent coverage because the negligent work was performed by a subcontractor, which triggered the subcontractor exception to the your work exclusion.[97]

In interpreting the occurrence requirement, the court was careful to distinguish between the subcontractor's negligent application of the stucco and the property damage caused by the resulting water intrusion.[98] In fact, the court overturned the trial court's holding that the CGL policy also covered the builder's costs of replacing and repairing the defective stucco itself.[99] According to the supreme court, the "product recall" exclusion applied, which precluded coverage for any loss incurred by the "repair, replacement, adjustment, removal or disposal" of the insured's own defective work.[100] The court found that this exclusion, serving as one of the bases for denying CGL coverage for claims of faulty workmanship, clearly prevented coverage for the costs associated with the stucco siding.[101]

c. *The Dissent in* Newman

In his dissent in *Newman*, Justice Pleicones maintained that there was no coverage under the CGL policy because the occurrence requirement had not been

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95. *Id.* at 196–97, 684 S.E.2d at 546.

96. *Id.* at 197, 684 S.E.2d at 546.

97. *Id.* at 195–96, 684 S.E.2d at 545 ("The facts of this case establish exactly the type of property damage the CGL policy was intended to cover after the 1986 amendment to the 'your work' exclusion.").

98. *Id.* at 197–98, 684 S.E.2d 546–47.

99. *Id.* at 198, 684 S.E.2d at 546–47. Despite the court's holding on this issue, the court did not strip these repair and replaced damages because it could not specifically identify them from the record, and the insurer failed to seek review or contest the arbitrator's damages award. *Id.* at 198, 684 S.E.2d at 547.

100. *Id.* at 197–98, 684 S.E.2d at 546 (internal quotation marks omitted); *see also* Shidlofsky & Wielinski, *supra* note 17, at 94 (describing the application of the product recall exclusion).

101. *Newman*, 385 S.C. at 198, 684 S.E.2d at 546–47. It should be noted, however, that the product recall exception is usually applied to withdrawing multiple "equipment or parts discovered to have a common fault" from the market, Shidlofsky & Wielinski, *supra* note 17, at 94–95, and the court's use of it in *Newman* has been questioned. *See id.* at 95 ("[T]he application of the exclusion under these circumstances is open to question, especially where the subcontractor exception expressly preserves coverage for the cost of repairing and replacing property damage caused by the defective work of subcontractors, including the work of the subcontractor itself.").

satisfied.[102] Justice Pleicones stated that the majority's reliance on the Tennessee court's treatment of an accident for purposes of the occurrence definition was "fundamentally inconsistent" with the court's opinion in *L-J*.[103] According to Justice Pleicones, *L-J* commanded that "[f]aulty workmanship by subcontractors which leads to deterioration or damages the work product itself is not an accident," and in *Newman*, the subcontractor's faulty workmanship did not cause damage to anything "other than the contractor's work product."[104] There was no property damage beyond the work product itself, Justice Pleicones argued, because the "work product [encompasses] the entire home, including the stucco, the framing, and the exterior sheathing."[105] In support of this broad interpretation of work product, Justice Pleicones cited the language of the your work exclusion in the policy, which defines your work as "work or operations performed by you . . . and materials, parts or equipment furnished in connection with such work or operations."[106]

C. A Synthesis of L-J *and* Newman

After *L-J* and *Newman*, the law in South Carolina appeared to be that faulty workmanship or defective construction alone did not constitute an occurrence within the meaning of the CGL policy.[107] However, where faulty workmanship caused damage beyond the defective work itself, there may be a finding of an occurrence if the intervening event was deemed an accident, including "continuous or repeated exposure to substantially the same harmful conditions."[108] Continuous moisture intrusion into a home caused by a subcontractor's negligent work qualified as such an accident where the intrusion was an unexpected happening or event not intended by the insured.[109] Thus, property damage that results from this occurrence, even if consisting of damage only to the insured's overall project, fell within a CGL policy's initial grant of coverage.[110] Further, the your work exclusion does not exclude the property damage covered under a CGL policy if a subcontractor performed the faulty workmanship.[111] However, the policy does not cover the cost of replacing and

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102. *Newman*, 385 S.C. at 199, 684 S.E.2d at 547 (Pleicones, J., dissenting) (citing L-J, Inc. v. Bituminous Fire & Marine Ins. Co., 366 S.C. 117, 123, 621 S.E.2d 33, 36 (2005)).

103. *Id.* at 200 n.6, 684 S.E.2d at 548 n.6 (citing Travelers Indem. Co. of Am. v. Moore & Assocs., Inc., 216 S.W.3d 302, 309 (Tenn. 2007); *L-J*, 366 S.C. at 123, 621 S.E.2d at 36).

104. *Id.* at 200, 684 S.E.2d at 548 (citing *L-J*, 366 S.C. at 123, 621 S.E.2d at 36).

105. *Id.* at 199, 684 S.E.2d at 547 (internal quotation marks omitted).

106. *Id.* at 200–01 n.7, 684 S.E.2d at 548 n.7.

107. *See id.* at 198, 684 S.E.2d at 546 (majority opinion).

108. *See id.* at 194, 684 S.E.2d at 544–45.

109. *Id.*

110. *Id.* at 194, 684 S.E.2d at 545.

111. *Id.* at 195–96, 684 S.E.2d at 545.

repairing the defective workmanship itself as an incidental cost to repairing the property damage because of the product recall exclusion.[112]

III. *CROSSMANN I*

A. *"[T]he latest and, possibly the greatest, installment in the Supreme Court's jurisprudence involving . . . construction defect claims."*[113]

Against the backdrop of the foregoing case law, the South Carolina Supreme Court decided *Crossmann Communities of North Carolina, Inc. v. Harleysville Mutual Insurance Co.*[114] The disposition of this case proved to be controversial within the construction and business community, ultimately producing a high profile rehearing and eliciting a legislative backlash.[115]

B. *Facts and Procedural History*

Between 1992 and 1999, Crossmann Communities of North Carolina, Inc. (Crossmann) developed five condominium projects in Myrtle Beach.[116] In 2001, the owners of these condominiums realized that the individual units had serious construction defects, including termite infestation and "substantial decay and deterioration" caused by water infiltration.[117] The aggrieved homeowners sued Crossmann, alleging various acts of negligent construction[118] and seeking actual damages, punitive damages, and the "loss of use and diminution in value."[119] After settling the homeowners' action for approximately $16.8 million, Crossmann sought indemnification for its losses from the multiple insurance companies that insured Crossmann's condominium project.[120] Several insurers agreed to settle with Crossmann,[121] but Harleysville Mutual Insurance Company

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112. *Id.* at 197–98, 684 S.E.2d at 546.

113. Stephen P. Groves, Sr., *Is It Flip-Flopping or Flop-Flipping? Clarifying Construction Defects Law in South Carolina*, NEXSEN PRUET ON THE DOCKET BLOG (Jan. 11, 2011, 11:33 AM), http://nexsenpruetonthedocket.blogspot.com/2011/01/is-it-flip-flopping-or-flop-flipping.html.

114. Crossmann Cmtys. of N.C., Inc. v. Harleysville Mut. Ins. Co. (*Crossmann I*), No. 26909, Shearouse Adv. Sh. No. 1 at 32 (S.C. Jan. 7, 2011), *withdrawn*, 395 S.C. 40, 717 S.E.2d 589 (2011).

115. *See* Frampton, *supra* note 12.

116. *Crossmann I*, Shearouse Adv. Sh. No. 1 at 33.

117. *Id.* at 33–34 & n.1.

118. *See id.* at 33–34. The complaint alleged the problems were due to "the improper installation of siding, windows, flashing at the windows, walkway floor sheathing, and wind resistant tie down straps; deterioration of structural columns and structural components; failure to completely install the building wrap; flooding of units; water infiltration; failure to properly attach handrails; failure to properly construct emergency stairs; termite infestation and destruction; and defective storm water drainage system." *Id.* at 33 n.1.

119. *Id.* at 34.

120. *Id.*

121. *Id.* at 35 n.3.

(Harleysville) refused to recognize coverage for the homeowners' damages.[122] Thereafter, Crossmann filed a declaratory judgment action to determine whether its CGL policy had been triggered.[123] At trial, the parties stipulated that property damage to the condominium projects "resulted from water intrusion, that the damage was progressive in nature, and that the damage was caused by the negligent construction of the subcontractors."[124] The parties also stipulated that they "would not argue [over] the applicability of any policy exclusions," and thus, the trial court was confronted with the dispositive issue of whether the property damage was caused by an occurrence.[125] The trial court held in favor of Crossmann, ruling that "the property damage was caused by an occurrence" because it "resulted from, and was in addition to, the subcontractors' negligent work itself."[126]

C. The South Carolina Supreme Court's Decision

On appeal, the supreme court reversed the trial court's order, holding that the damage to the condominiums was not caused by an occurrence and that, without an occurrence, there was no CGL coverage.[127] Writing for the court, Justice Kittredge summarily rejected Crossmann's argument that because the negligent work was performed by its subcontractors, the subcontractor exception preserved coverage for the damage arising out of the faulty construction of the units.[128] According to the court, for that exception to apply, there must have first been a finding of coverage, i.e., the policy must have been initially triggered by property damage resulting from an occurrence during the policy period.[129] The determination of whether the damage caused by faulty workmanship resulted from an occurrence in accordance with the terms of the CGL policy required wading into the "intellectual mess" surrounding the various approaches to interpreting a CGL policy.[130]

The court began its analysis by examining the two general, divergent views jurisdictions have taken regarding whether CGL coverage exists for damages caused by faulty workmanship.[131] The majority rule provides that faulty construction-induced damage does not result from an occurrence because the consequences of a contractor's intentional work (that is later deemed to be of

122. *Id.* at 34.
123. *Id.*
124. *Id.*
125. Crossmann Cmtys. of N.C., Inc. v. Harleysville Mut. Ins. Co. (*Crossmann II*), 395 S.C. 40, 46, 717 S.E.2d 589, 592 (2011).
126. *Crossmann I*, Shearouse Adv. Sh. No. 1 at 34 (internal quotation marks omitted).
127. *Id.* at 33, 47.
128. *Id.* at 37.
129. *Id.*
130. *See id.*
131. *See id.* at 38.

poor quality) can never truly be considered an unintended accident.[132] The court pointed out that the majority rule has generally been justified by two somewhat interrelated rationales. One rationale rests on the view that a CGL policy is designed to insure tort risks—not the *business risks* associated with a construction project.[133] Whereas a CGL policy contemplates coverage for bodily injury and damage to other property, faulty workmanship that harms just the contractor's own project is viewed simply as the contractor's failure to perform his end of the bargain.[134] According to this view, the failure to fulfill the economic expectations of the third party does not represent a tort, but rather a breach of contract that requires the contractor to accept the financial obligations connected with repairing the defective work.[135] The court explained that at the heart of the second rationale for the majority rule is the reasoning that an event where faulty workmanship directly causes property damage lacks the required fortuity element of an accident within the meaning of the occurrence term.[136] Consistent with the idea that an "insured should not be able to control the risk" of triggering an insurable event,[137] liability insurance is meant to cover only accidental and unintended events, thereby excluding damage resulting from negligent construction which, the court stated, is the "natural and ordinary consequence of the faulty work."[138] The court explained, however, that a common criticism of the majority rule is that the finding of an occurrence becomes contingent on the extent of the resulting damage, i.e., if the faulty workmanship causes damage to a third party's property, there exists an occurrence, but, if there is damage only to the insured's project, there exists no occurrence.[139]

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132. *See id.*

133. *Id.* at 39. Business risks are defined as "risks which management . . . cannot effectively avoid because of the nature of the business operations; and risks which relate to the repair or replacement of faulty work or products. These risks are a normal, foreseeable and expected incident of doing business and should be reflected in the price of the product or service rather than as a cost of insurance to be shared by others." Peter J. Neeson & Phillip J. Meyer, *The Comprehensive General Liability Policy and Its Business Risk Exclusions: An Overview*, *in* REFERENCE HANDBOOK ON THE COMPREHENSIVE GENERAL LIABILITY POLICY: COVERAGE PROVISIONS, EXCLUSIONS, AND OTHER LITIGATION ISSUES 75, 78 (Peter J. Neeson ed., 1995) (citing George H. Tinker, *Comprehensive General Liability Insurance—Perspective and Overview*, 25 FED'N INS. COUNS. Q. 217, 224 (1975)).

134. *Crossmann I*, Shearouse Adv. Sh. No. 1 at 39.

135. *See id.* at 39–40; *see also* SMITH, CURRIE & HANCOCK'S COMMON SENSE CONSTRUCTION LAW: A PRACTICAL GUIDE FOR THE CONSTRUCTION PROFESSIONAL 525 (Thomas J. Kelleher, Jr. & G. Scott Walters eds., 4th ed. 2009) ("[T]he contractor bears the business risk of replacing or repairing defective work to make the building or project conform to the agreed contractual requirements.").

136. *Crossmann I*, Shearouse Adv. Sh. No. 1 at 40.

137. *See* Shidlofsky & Wielinski, *supra* note 17, at 72 (noting that the fortuity requirement is "part and parcel of the basic tenet of insurance that an insured should not be able to control the risk and obtain insurance coverage for intentional acts").

138. *Crossmann I*, Shearouse Adv. Sh. No. 1 at 40.

139. *Id.* at 41.

The minority rule provides that where property damage is caused by faulty workmanship, an occurrence exists, unless the insured intends or expects the accident.[140] The court stated that jurisdictions applying the minority approach make no distinction between tort risk and business risk.[141] To illustrate the rule, the court cited a Tennessee case for the proposition that an accident is present where the faulty workmanship causes an event that is unforeseen from the insured's point of view—even if the insured intends the act that eventually causes the accident.[142] As noted by the court, the common criticism of the minority rule is that it, arguably, converts an insurance liability policy into a performance bond.[143] Under either theory, however, the court pointed out that there is no CGL insurance for repairing or replacing the faulty workmanship itself.[144]

Following this discussion on the different interpretations of standard CGL policies, the court then revisited its *L-J* and *Newman* opinions, explaining the important distinction between the two.[145] In *L-J*, because the damage was solely to the contractor's work product (the roadway), it did not result from an occurrence.[146] On the other hand, in *Newman*, because the property damage to the home extended beyond the defective work product itself, the progressive water intrusion amounted to an occurrence.[147] At this point in *Crossmann I*, however, the court made a significant about-face and decided that its reasoning in *Newman* was flawed.[148] According to the court, by focusing on the "continuous or repeated exposure to substantially the same harmful conditions" language, the *Newman* court ignored the fortuity element inherent in the concept of an accident.[149] The court stated that, under the proper interpretation of the occurrence requirement, *Newman* should have been decided against the insured because the continuous moisture intrusion was not a fortuitous event and, thus, not an accident.[150]

After making this pronouncement, the court declared that the *Newman* opinion's property damage analysis remained on solid legal footing.[151] The court insisted that it was not adopting the *Newman* dissent's view that damage to a different part of the same structure caused by faulty workmanship simply

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140. *Id.*

141. *See id.*

142. *See id.* (citing Travelers Indem. Co. of Am. v. Moore & Assocs., Inc., 216 S.W.3d 302, 310–11 (Tenn. 2007)).

143. *Id.*

144. *Id.*

145. *See id.* at 42.

146. *Id.*

147. *Id.* at 43–44 (citing Auto Owners Ins. Co. v. Newman, 385 S.C. 187, 194, 684 S.E.2d 541, 544–45 (2009)).

148. *Id.* at 44 (citing *Newman*, 385 S.C. at 194, 684 S.E.2d at 544–45).

149. *Id.* (internal quotation marks omitted) (citing *Newman*, 385 S.C. at 194, 684 S.E.2d at 544–45).

150. *Id.* at 44, 49.

151. *Id.* at 44.

results in damage to the contractor's own work product, which cannot constitute an occurrence.[152] The court found fault with this bright-line rule, pointing out that coverage could be triggered in such a work product scenario as long as the resultant property damage was "caused by an occurrence."[153] To demonstrate the viability of its new approach, the court described two hypothetical examples of where faulty workmanship that damaged only the insured work product would constitute an occurrence and, thus, be covered under a CGL policy.[154] In the first example, during the construction of an apartment building, the subcontractor installs defective electrical wiring, which later causes the completed building to sustain fire damage.[155] In the second example, while building a new home, a subcontractor negligently constructs the foundation of the residence. After moving into the home, the homeowner hires a landscaper to plant shrubs in the yard. The landscaper, using a Bobcat machine to dig a ditch, accidentally collides with the home's foundation and, due to the defective construction, part of the house collapses.[156] In each illustration, a fortuitous event, i.e., the sparking of the electrical fire and the Bobcat's collision with the foundation, effectuates an accident, which in turn causes damage beyond the original defective part. Although each accident caused damage only to the insured's own work product, because the damage arose out of an occurrence, it would still trigger coverage.[157]

Before addressing the facts of *Crossmann*, the court synthesized the foregoing principles: "[F]aulty workmanship is not an occurrence," however, "faulty workmanship can *cause* an occurrence" if the ensuing damage resulted from a fortuitous accident.[158] Consequently, the issue before the court crystallized into whether faulty workmanship that directly causes injury to otherwise non-defective property within the same overall project satisfies the occurrence requirement.[159] The court resolved this issue by returning to the policy definition of an occurrence: "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."[160] While the term accident went undefined in the CGL policy, the court acknowledged, as it did in *Newman*,[161] that it previously defined an accident as "an unexpected happening or event, which occurs by chance and usually suddenly, with harmful results, not intended or designed by the person suffering

152. *Id.* (citing *Newman*, 385 S.C. at 199, 684 S.E.2d at 547 (Pleicones, J., dissenting)).

153. *Id.* (internal quotation marks omitted).

154. *Id.* at 45 (citing NAT'L UNDERWRITER CO., FIRE, CASUALITY & SURETY BULLETINS, PUBLIC LIABILITY, at A3-14 (2001) [hereinafter NAT'L UNDERWRITER CO.]) (these examples were presented to the court by Harleysville and published by the National Underwriter Company).

155. *Id.* (quoting NAT'L UNDERWRITER CO., *supra* note 154, at A3-14).

156. *Id.* (quoting NAT'L UNDERWRITER CO., *supra* note 154, at A3-14).

157. *Id.* at 46.

158. *Id.* (emphasis added) (internal quotation marks omitted).

159. *Id.*

160. *Id.* (internal quotation marks omitted).

161. *See supra* text accompanying note 84.

the harm or hurt."[162] The court also noted that Black's Law Dictionary provides that an accident is an "unintended and unforeseen injurious occurrence; something that does not occur in the usual course of events or that could not be reasonably anticipated."[163] Based on these definitions, the court reaffirmed that the meaning of an accident necessarily incorporated the notion of fortuity, that is, a "chance" event.[164] Furthermore, the court cited with approval a pair of Illinois appellate court opinions for the proposition that damage caused by faulty workmanship does not result from an occurrence where that damage was the "natural and ordinary consequence[]" of the construction defect.[165] Although not expressly stated, the court implied that the natural and ordinary damage could not be the result of an accident because there is nothing fortuitous in a causal relationship between an act and its expected consequences.[166]

Equipped with this refined occurrence definition—interwoven with its fortuity component—the court held that the extensive property damage to Crossmann's condominium units was not caused by an occurrence under its CGL policy.[167] According to the court, because the water intrusion damage to the condominium units was the natural and expected consequence of the contractor's defectively installed siding, the injury-causing event lacked the necessary fortuity element of an accident.[168] The court rejected the argument that an occurrence existed under the "continuous or repeated exposure to substantially the same harmful conditions" language or that this modern definitional phrase created an ambiguity in the policy.[169] The court explicitly held that this language in the modern occurrence definition "neither create[d] an ambiguity for insurance contract construction purposes nor diminishe[d] the fortuity element inherent in an accident."[170] While acknowledging that other jurisdictions may disagree with its analysis, the court concluded that allowing coverage in these factual scenarios would convert the insurance policy into a performance bond.[171]

The court then briefly turned its attention away from the occurrence requirement and towards the property damage requirement.[172] The court made it

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162. *Crossman I*, Shearouse Adv. Sh. No. 1 at 46 (quoting Collins Holding Corp. v. Wausau Underwriters Ins. Co., 379 S.C. 573, 578, 666 S.E.2d 897, 899–900 (2008)) (internal quotation marks omitted).

163. *Id.* at 46–47 (quoting BLACK'S LAW DICTIONARY 13 (8th ed. 2005)) (internal quotation marks omitted).

164. *Id.* at 46.

165. *Id.* at 47 (citing Viking Constr. Mgmt., Inc. v. Liberty Mut. Ins. Co., 831 N.E.2d 1, 15 (Ill. App. Ct. 2005); State Farm Fire & Cas. Co. v. Tillerson, 777 N.E.2d 986, 991 (Ill. App. Ct. 2002)).

166. *See id.*

167. *Id.*

168. *Id.*

169. *Id.* at 49 (internal quotation marks omitted).

170. *Id.* (internal quotation marks omitted).

171. *Id.*

172. *Id.* at 47.

clear that its holding did not support an inexorable rule that damage to the insured's work product can never constitute property damage under a CGL policy.[173] The court again referenced the hypothetical situations provided by the National Underwriter Company as examples of where the property damage requirement could be satisfied by damage to an insured's own work product.[174] Building on this point, the court was forced to address its *L-J* opinion, in which the court remarked in a footnote that while a CGL policy may provide coverage for "damage to other property, [it would] not in cases where faulty workmanship damage[d] the work product alone."[175] The court, in *Crossmann I*, was concerned that this language could be misinterpreted to mean that a CGL policy's property damage requirement is met only by damage to a third party's property.[176] With little elaboration, the court stated that such an interpretation would be inconsistent with the "policy as a whole."[177] Thus, the court expressly embraced a narrow interpretation of work product, which "encompasses only the alleged negligently constructed component and not the non-defective components" of the insured's overall project.[178]

The court then reiterated its holding to make clear its decision in the case. The court provided that the first step in resolving a CGL coverage dispute is to identify "whether there has been an occurrence."[179] An occurrence is proven only by evidence of a fortuitous accident.[180] When a general contractor negligently constructs a home and the negligence results in further damage to the structure, the occurrence requirement is not satisfied, unless there exists "an unintended, unforeseen, fortuitous, or injurious event."[181] If there is an occurrence, then the court will determine whether the resulting damage is covered as property damage under the policy.[182] Damage to the contractor's own project can qualify as property damage as long as the damage in question is separate from the initial defective component.[183] Because Crossmann's subcontractor's faulty workmanship caused damage that was only the natural and expected result of faulty workmanship, there was no fortuitous accident, and thus, no occurrence, and no insurance coverage.[184]

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173. *Id.* at 47–48.

174. *Id.* at 48.

175. *Id.* (alteration in original) (quoting L-J, Inc. v. Bituminous Fire & Marine Ins. Co., 366 S.C. 117, 123 n.4, 621 S.E.2d 33, 36 n.4 (2005)) (internal quotation marks omitted).

176. *See id.*

177. *Id.*

178. *Id.*

179. *Id.* at 49 (internal quotation marks omitted).

180. *Id.*

181. *Id.*

182. *Id.*

183. *See id.* at 48.

184. *Id.* at 49–50.

D. The Concurrence

Justice Pleicones, concurring in the result,[185] wrote his own opinion based on a point he articulated in his *Newman* dissent—a general contractor's work product is the entire structure in question.[186] According to Justice Pleicones, a simple application of the original meaning of *L-J* to the *Crossmann* facts warranted finding no coverage.[187] Under *L-J*'s established rule, faulty workmanship by a contractor or a subcontractor that results in property damage to the insured's work product does not cause an occurrence; therefore, in *Crossmann*, the subcontractor's faulty construction work that resulted in continuous damage to each respective condominium unit did not constitute an occurrence.[188] Notwithstanding his differing view on the work product issue, Justice Pleicones seemingly approved of the majority's imposition of a fortuity element into the occurrence definition.[189] He referenced the court's sparked fire scenario as an example where a contractor's work "truly [causes] an accident" and where the resultant damage to the work product would trigger CGL coverage.[190]

E. The Aftermath

Caught off guard by the court's opinion,[191] construction lawyers in South Carolina quickly mobilized in an attempt to blunt the potential impact of the ruling on their clients.[192] Advocating on behalf of homebuilders and other construction professionals, these lawyers argued that the decision would have a deleterious effect on the construction industry, already languishing because of the recession, by prohibitively increasing the costs of business for contractors and subcontractors.[193] The General Assembly responded to these lobbying efforts by passing a bill designed to negate *Crossmann I*, mandating that faulty workmanship that causes property damage be treated as an occurrence within the meaning of the CGL policy.[194] This legislation took immediate effect on May

185. *Id.* at 51 (Pleicones, J., concurring).

186. *See id.*; *see also* Auto Owners Ins. Co. v. Newman, 385 S.C. 187, 199, 684 S.E.2d 541, 547 (2009) (Pleicones, J., dissenting).

187. *Crossman I*, Shearouse Adv. Sh. No. 1 at 51 (Pleicones, J., concurring) (citing L-J, Inc. v. Bituminous Fire & Marine Ins. Co., 366 S.C. 117, 123, 621 S.E.2d 33, 36 (2005)).

188. *See id.* (citing *L-J*, 366 S.C. at 123, 621 S.E.2d at 36).

189. *See id.*

190. *Id.*

191. *See* Groves, *supra* note 113; Clay Olson, Harleysville v. Crossmann *Decision Diminished by SC Legislature*, SOUTH CAROLINA CONSTRUCTION DEFECT LAW (May 17, 2011, 8:21 PM), http://southcarolinaconstructiondefense.wordpress.com/2011/05/17/harleysville-v-crossman-decision-in-south-carolina-trumped-by-sc-legislature-this-afternoon/.

192. *See* COASTAL CONTRACTOR ONLINE, *supra* note 2; Olson, *supra* note 191.

193. *See* Nichols, *supra* note 4, at 27.

194. COASTAL CONTRACTOR ONLINE, *supra* note 2; *see also* Clifford J. Shapiro & Kenneth M. Gorenberg, *The New Wave of Insurance Construction Defects? Four States Enact Statutes*

17, 2011.[195] However, by that time, the supreme court had already agreed to rehear the case on May 23, 2011.[196] At the rehearing, the court heard spirited arguments from the two parties, and in addition, accepted twelve briefs filed by a diverse group of amicus curiae, many of whom also presented oral arguments.[197]

IV. *CROSSMANN II*

On August 22, 2011, the South Carolina Supreme Court withdrew its initial opinion and issued a refiled opinion, affirming the trial court's order that Crossmann's CGL policy covered the damage to the condominium.[198] Again writing for the court, Justice Kittredge acknowledged the difficulty courts have had nationwide—particularly in progressive damage cases—in assessing the existence of an occurrence within the meaning of a CGL policy.[199] This problem in applying the occurrence definition to a progressive damage factual situation, the court recognized, reflected the term's "lack of a clear meaning."[200] The court determined that the additional "continuous or repeated exposure to substantially the same general harmful conditions" language created an ambiguity in the occurrence definition that, according to basic contract interpretation principles, must be construed against the insurer.[201] Therefore, the court held, on rehearing, that the CGL policy's insuring agreement was triggered because the "repeated water intrusion" constituted an occurrence that caused property damage.[202]

To explain this result, which was diametric to its withdrawn opinion, the court returned to *Newman*, which also involved progressive damage due to continuous water intrusion.[203] The court noted that in *Newman* it originally held

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Favoring Coverage for Faulty Workmanship, THE NATIONAL L. REV. (July 15, 2011), http://www.natlawreview.com/article/new-wave-insurance-construction-defects-four-states-enact-statutes-favoring-coverage-faulty-.

195. S. 431, 119th General Assem. (S.C. 2011) (codified at S.C. CODE ANN. § 38-61-70 (Supp. 2011)).

196. *See* COASTAL CONTRACTOR ONLINE, *supra* note 2

197. *See* Frampton, *supra* note 12; Nichols, *supra* note 4.

198. Crossmann Cmtys. of N.C., Inc. v. Harleysville Mut. Ins. Co. (*Crossmann II*), 395 S.C. 40, 44, 717 S.E.2d 589, 591 (2011). Much of the court's discussion in *Crossmann II* addresses the problem of how to allocate losses in a progressive damage case where successive insurers cover the project. *See id.* at 50–67, 717 S.E.2d at 594–603 (adopting the "time on risk approach to defin[e] the scope of each CGL insurer's obligation"). This question requires the court to ascertain precisely when each policy was triggered. *Id.* at 52, 717 S.E.2d at 595. Because there was a finding of no occurrence in *Crossmann I*, the court did not have to address the trigger and allocation issues in that opinion. This Note leaves an analysis of those topics for another day.

199. *Id.* at 47, 717 S.E.2d at 592.

200. *Id.* at 47, 717 S.E.2d at 592–93.

201. *Id.* (internal quotation marks omitted). The Court cited *Super Duper, Inc.* v. *Pa. Nat'l Mut. Cas. Ins. Co.*, 385 S.C. 201, 210, 683 S.E.2d 792, 796 (2009), for the well-established proposition that "[a]mbiguous terms must be construed in favor of the insured," *Crossmann II*, 395 S.C. at 47, 717 S.E.2d at 593.

202. *Crossmann II*, 395 S.C. at 47, 717 S.E.2d at 593.

203. *See id.* at 48, 717 S.E.2d at 593.

that the property damage to the home was caused by an occurrence under the broader "continuous or repeated exposure to substantially the same harmful conditions" accident formulation.[204] Justice Kittredge reworked the rationale utilized in *Newman* to reach the same outcome, explaining that, in determining whether progressive damage triggers CGL coverage, it is important to first analyze separately the property damage requirement.[205] Chiefly defined as "[p]hysical injury to tangible property,"[206] the term "property damage" implies damage to property that "was not defective at the outset," but that was "injured" after a specific event.[207] The court unequivocally endorsed the view that, in contrast to claims for replacement of a defective component part or fixing faulty installation, which are not claims for property damage,[208] "a claim for the costs of repairing damage caused by the defective work . . . is a claim for property damage."[209] Then, the court stated that only *after* property damage has been established will the court reach the occurrence requirement.[210]

According to the court, the *Newman* outcome was congruent with this new analytical framework.[211] The replacement of the defective stucco in *Newman* did not constitute property damage because the stucco was not "initially proper and injured thereafter."[212] On the other hand, the alleged damage to the home's sheathing and framing constituted property damage because it was initially non-defective work that was subsequently injured.[213] According to the court in *Crossmann II*, the property damage in *Newman* resulted from an occurrence because the occurrence term was ambiguous and was thus construed in favor of the insured.[214] This clarified explanation of how coverage was triggered in *Newman* reconciled the holding in that case with *Crossmann II*.[215] Accordingly, the court held that Harleysville's CGL policy was similarly triggered by property damage that resulted from an occurrence.[216] Because the damage to the condominium units reached beyond the original negligent construction,

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204. *Id.* (internal quotation marks omitted) (citing Auto Owners Ins. Co. v. Newman, 385 S.C. 187, 194, 684 S.E.2d 541, 544–45 (2009)).

205. *Crossmann II*, 395 S.C. at 48, 717 S.E.2d at 593.

206. *Id.* *See supra* text accompanying note 54 for the complete definition of property damage in a standard CGL policy.

207. *Crossmann II*, 395 S.C. at 49, 717 S.E.2d at 593.

208. *Id.* The cost associated with this damage would also be excluded under the product recall exception. *See supra* text accompanying notes 100–101.

209. *Crossmann II*, 395 S.C. at 49, 717 S.E.2d at 593 (internal quotation marks omitted).

210. *Id.* at 49, 717 S.E.2d at 594.

211. *See id.* at 49–50, 717 S.E.2d at 594.

212. *Id.* at 49, 717 S.E.2d at 593–94.

213. *Id.* at 49, 717 S.E.2d at 594.

214. *Id.* 49–50, 717 S.E.2d at 594.

215. *See id.*; *see also* Marc M. Schneier, *South Carolina Supreme Court Rules That Subcontractors' Faulty Installation of Exterior Components Caused "Property Damage" in the Form of Water Injury to Buildings' Nondefective Components; the Repeated Water Intrusions Constituted an "Occurrence" Under Developer's CGL Policy*, 32 CONSTRUCTION LITIG. REP., Oct. 2011 at 8, 8.

216. *Crossmann II*, 395 S.C. at 50, 717 S.E.2d at 594.

Crossmann established the existence of property damage.[217] Regarding whether this property damage resulted from an occurrence, the court concluded that the occurrence term was ambiguous and must be construed against Harleysville.[218]

V. AN ANALYSIS OF *CROSSMANN* AND ITS IMPLICATIONS FOR CONSTRUCTION LAW

To anyone listening to the oral argument at the rehearing, the court's reversal of course in *Crossmann II* was hardly unexpected.[219] The court was clearly concerned with the outcome in *Crossmann I*.[220] The Justices' line of questioning appeared just as much framed to answer whether Crossmann could convince the court to withdraw its initial opinion, as whether Harleysville could convince the court *not* to withdraw the opinion.[221] While the court's holding that coverage existed may have been foreseeable, the court's reasoning was somewhat surprising considering that the court in *Crossmann I* specifically rejected the view that the "continuous or repeated" language created an ambiguity in the occurrence definition.[222]

In any event, there were strong countervailing arguments against the result in *Crossmann I* based on the language of the occurrence definition, the court's precedent, and other states' treatment of the issue. The rationale employed by the court in *Crossmann II* to find that coverage was triggered—that the occurrence definition is ambiguous and must be construed against the insurer[223]—is appropriate given the multitude of diverging and conflicting opinions and general confusion regarding the issue. Because both parties had reasonable interpretations of the occurrence definition within the meaning of the CGL policy, the court exercised the most viable option by forging a compromise between the two competing positions. Nonetheless, the analytical framework established in *Crossmann II* for adjudicating construction related claims under a CGL policy may indicate that South Carolina will join those states holding that an occurrence exists where faulty workmanship causes damage to non-defective component parts of an insured's project. This possibility should only be explored with regard to the state statute enacted to negate the court's initial ruling.

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217. *See id.* at 44, 50, 717 S.E.2d at 591, 594.

218. *Id.* at 50, 717 S.E.2d at 594.

219. Oral Argument at tape 1, side 2, Crossmann Cmtys. of N.C., Inc. v. Harleysville Mut. Ins. Co. (*Crossmann II*), 395 S.C. 40, 717 S.E.2d 589 (No. 26909) (available at the Clerk of Court's office at the South Carolina Supreme Court). All references to "oral argument" herein are references to the oral argument at the May 23, 2011, rehearing.

220. *Id.*

221. *Id.*

222. Crossmann Cmtys. of N.C., Inc. v. Harleysville Mut. Ins. Co. (*Crossmann I*), No. 26909, Shearouse Adv. Sh. No. 1 at 49 (S.C. Jan. 7, 2011), *withdrawn*, 395 S.C. 40, 717 S.E.2d 589 (2011).

223. *Crossmann II*, 395 S.C. at 47, 717 S.E.2d at 592–93.

A. An Ambiguity: Two Reasonable but Conflicting Interpretations

Crossmann II resolved the coverage dispute in favor of the insured contractor because the property damage prong of the insuring agreement was first satisfied in the form of injury to previously non-defective work beyond the faulty workmanship.[224] On the question of whether this property damage resulted from an occurrence, the court deemed the occurrence term ambiguous because it "lack[ed] . . . a clear meaning," and construed it against the insurance company.[225] That the term occurrence lacked a clear meaning does not mean that the term lacked meaning altogether, i.e., that the parties could not have each had a reasonable understanding of the term.[226] A policy term need not be ambiguous in the abstract to be construed against the drafter. An ambiguity must be construed against the drafter if it is created by "reasonable disagreement [over its] interpretation."[227] Thus, by acknowledging an ambiguity, the court impliedly accepted as a reasonable interpretation of the occurrence term both Crossmann's view that the project's exposure to continuous water intrusion satisfied the policy term's definitional language, and Harleysville's view that damage directly resulting from faulty workmanship lacked the necessary fortuity element inherent in an accident.

1. Insured Contractor's Interpretation Was Reasonable

a. Consistent with the Plain Meaning of the Occurrence Definition

The court's acknowledgment that Crossmann's interpretation of the occurrence term was reasonable is appropriate considering the plain meaning of its definition: "an accident, including *continuous or repeated exposure to substantially the same general harmful conditions*."[228] The parties stipulated that water intrusion caused the damage to the condominium units and that the water intrusion was a result of faulty workmanship.[229] The parties also stipulated that the damage was progressive, starting within thirty days of each units' certification for occupancy and not ending until each unit was repaired.[230]

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224. *Id.* at 50, 717 S.E.2d at 594.

225. *Id.*

226. *See* High Country Assocs. v. N.H. Ins. Co., 648 A.2d 474, 478 (N.H. 1994) (citing Smith v. Liberty Mut. Ins. Co., 536 A.2d 164, 166 (N.H. 1987)) (explaining that there can be reasonable disagreement as to meaning between parties).

227. *See id.* (citing *Smith*, 536 A.2d at 167); *see also* Architex Ass'n v. Scottsdale Ins. Co., 27 So. 3d 1148, 1157 (Miss. 2010) ("Ambiguities exist when a policy can be logically interpreted in two or more ways, where one logical interpretation provides for coverage.").

228. Shidlofsky & Wielinski, *supra* note 17, at 72 (emphasis added) (internal quotation marks omitted).

229. Crossmann Cmtys. of N.C., Inc. v. Harleysville Mut. Ins. Co. (*Crossmann I*), No. 26909, Shearouse Adv. Sh. No. 1 at 34 (S.C. Jan. 7, 2011), *withdrawn*, 395 S.C. 40, 717 S.E.2d 589 (2011).

230. *Crossmann II*, 395 S.C. at 46, 717 S.E.2d at 592.

Thus, each unit was continuously exposed to the faulty workmanship from approximately the time the project was completed until the time the damage was discovered. During this period, because of the defective siding, sheathing, and windows, water repeatedly infiltrated the structures of the condominium units, causing "substantial decay and deterioration."[231] Therefore, it seems reasonable to conclude that the condominium units, plagued by water intrusion, were in a general state of harmful condition. The units were exposed to these harmful conditions both continuously, because the units remained defective during this period, and repeatedly, because water infiltrated the units over the course of a few years.

According to the definition of occurrence, even if an event qualifies as the "continuous or repeated exposure to substantially the same general harmful conditions," the event still must be deemed an accident to meet the occurrence requirement.[232] However, the mere presence of the "continuous or repeated exposure" language implies that certain qualifying accidents do not have to be characterized as sudden or isolated. By its own terms then, the occurrence definition contemplates progressive damage situations where the accident is not immediately apparent. Thus, Crossmann's position that the repeated water intrusion constituted an occurrence is all the more reasonable, considering the broader meaning of an accident that attached with the addition of the "continuous or repeated" language.

b. Consistent with Newman *and Other States*

The holding of *Crossmann I* was unsettling not only because of the presence of the "continuous or repeated" phrase in the occurrence definition, but also because the court previously relied on that language in *Newman* to find an occurrence in a progressive damage situation.[233] By making operative the "continued or repeated" language, in conjunction with South Carolina's traditional definition of an accident, *Newman* determined that an influx of moisture into the home constituted an occurrence.[234] *Newman*'s reliance on the "continued or repeated" provision is not uncommon as other courts have also found this language especially applicable in water intrusion cases.[235]

For example, in *Lee Builders, Inc. v. Farm Bureau Mutual Insurance Co.*, the Kansas Supreme Court held that water leakage into a home as a result of defective windows met the CGL policy's occurrence definition because the

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231. *Crossmann I*, Shearouse Adv. Sh. No. 1 at 33–34 & n.1.

232. SHIDLOFSKY & WIELINSKI, *supra* note 17, at 72 (internal quotation marks omitted); *see supra* text accompanying note 33.

233. *See* Auto Owners Ins. Co. v. Newman, 385 S.C. 187, 194, 684 S.E.2d 541, 544–45 (2009).

234. *Id.*

235. *See* Timothy P. Law, *What Is an "Occurrence"?*, *in* NEW APPLEMAN ON INSURANCE: CURRENT CRITICAL ISSUES IN INSURANCE LAW, Fall 2010, at 83, 100.

faulty workmanship caused "continuous exposure of the home . . . to moisture," which "in turn caused damage."[236] In another defective windows case, the Tennessee Supreme Court held that water penetration that led to the deterioration of a hotel's interior constituted an occurrence under the insured's CGL policy.[237] Because the water penetration was an event, not foreseeable by the insured, that included the "continued or repeated exposure to substantially the same general harmful conditions," the CGL policy covered the resulting damage.[238] A Louisiana appellate court, faced with the familiar fact pattern of leaking windows and doors as a result of defective stucco application, summarily concluded that "[r]egardless of the cause of the leaks, this was 'continuous or repeated exposure to substantially the same general harmful conditions,'" and thus, an occurrence.[239]

Indeed, these cases support the argument that, despite the fortuity component, the "continuous or repeated exposure" clause of the occurrence definition contemplates coverage for progressive damage situations, such as continuous water intrusion into the home. Moreover, the New Hampshire Supreme Court, in *High Country Associates v. New Hampshire Insurance Co.*, stated that it was reasonable to interpret "accident" to mean an unexpected or unintended happening—not necessarily involving "a sudden and identifiable event."[240] According to that court, "[o]ccurrence has a broader meaning than accident because occurrence includes an injurious exposure to continuing conditions as well as a discrete event."[241] The South Carolina Supreme Court utilized this broader interpretation of the occurrence requirement in *Newman*;[242] however, in *Crossmann I*, the court jettisoned this formulation in a similar progressive damage factual situation.[243]

2. *Insurer Harleysville's Position Was Reasonable*

Though a departure from its reasoning in *Newman*, the court's holding in *Crossmann I* that the condominium units' exposure to water intrusion did not constitute a fortuitous accident, and thus was not an occurrence,[244] was by no means an unreasonable position. It is widely accepted that CGL polices respond

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236. 137 P.3d 486, 495 (Kan. 2006); *see* Law, *supra* note 235, at 100 (citing *Lee Builders*, 137 P.3d at 488, 495).

237. Travelers Indem. Co. of Am. v. Moore & Assocs., Inc., 216 S.W.3d 302, 309 (Tenn. 2007).

238. *Id.* at 308–09 (internal quotation marks omitted).

239. McMath Constr. Co. v. Dupuy, 897 So. 2d 677, 679, 681 (La. Ct. App. 2004).

240. 648 A.2d 474, 478 (N.H. 1994).

241. *Id.* at 477 (quoting Vt. Mut. Ins. Co. v. Malcolm, 517 A.2d 800, 802 (N.H. 1986)) (internal quotation marks omitted).

242. Auto Owners Ins. Co. v. Newman, 385 S.C. 187, 194, 684 S.E.2d 541, 544–45 (2009).

243. Crossmann Cmtys. of N.C., Inc. v. Harleysville Mut. Ins. Co. (*Crossmann I*), No. 26909, Shearouse Adv. Sh. No. 1 at 44 (S.C. Jan. 7, 2011), *withdrawn*, 395 S.C. 40, 717 S.E.2d 589 (2011).

244. *Id.* at 49–50.

only to fortuitous events,[245] and it is not uncommon for courts to rationalize that the policy covers "only injury *resulting from accidental acts* and not injury *accidentally caused by intentional acts*."[246] For example, the Superior Court of Pennsylvania recently held that property damage resulting from a subcontractor's faulty workmanship was not covered where water leaked through a home's defective stucco exterior and windows.[247] The court stated that the repeated water intrusion into the interior of the structure did not constitute an occurrence because the "natural and foreseeable acts, such as rainfall, which tend to exacerbate the damage, effect, or consequences caused *ab initio* by faulty workmanship also cannot be considered sufficiently fortuitous."[248] According to the court, even if the damage causing event was categorized as a "continuous or repeated exposure to substantially the same general harmful conditions," there would still be no occurrence.[249] The court said that the continuous or repeated language was not a separate standard for meeting the occurrence requirement and did not diminish the necessary fortuity element in an accident.[250]

Jurisdictions that adhere to this approach instruct that without the fortuity requirement the risk of a subcontractor's faulty workmanship would be shifted to the CGL insurer and act as a disincentive for general contractors to avoid inexperienced subcontractors.[251] In fact, the South Carolina Supreme Court originally appeared to support this notion, stating in *L-J* that its finding of no occurrence would place "ultimate liability" on the party who was negligent, which in turn would "encourage contractors to choose their subcontractors more carefully."[252] In addition, the court's concern in both *L-J* and *Crossmann I*, that a finding of an occurrence where faulty workmanship causes damage would have transformed the CGL policy into a performance bond, is shared by other jurisdictions.[253] This concern is even more prevalent due to the almost universal

245. *See* Savrin & Surden, *supra* note 39, at 42.

246. *Id.* at 43 (quoting Owners Ins. Co. v. James, 295 F. Supp. 2d 1354, 1364 (N.D. Ga. 2003)) (internal quotation marks omitted).

247. Millers Capital Ins. Co. v. Gambone Bros. Dev. Co., 941 A.2d 706, 713–14 (Pa. Super. Ct. 2007).

248. *See id.* at 713 (citing Kvaerner Metals Dir. of Kvaerner U.S., Inc. v. Commercial Union Ins. Co., 908 A.2d 888, 899 (Pa. 2006)).

249. *See id.* at 714 (internal quotation marks omitted).

250. *Id.*

251. *See* Savrin & Surden, *supra* note 39, at 44 (quoting Gen. Sec. Indem. Co. v. Mountain States Mut. Cas. Co., 205 P.3d 529, 536 (Colo. App. 2009)).

252. *See* L-J, Inc. v. Bituminous Fire & Marine Ins. Co., 366 S.C. 117, 124, 621 S.E.2d 33, 37 (2005).

253. *See, e.g.*, Essex Ins. Co. v. Holder, 261 S.W.3d 456, 459 (Ark. 2003) ("The purpose of a CGL policy is to protect an insured from bearing financial responsibility for unexpected and accidental damage to people or property. It is not intended to substitute for a contractor's performance bond . . . ." (quoting Nabholz Constr. Corp. v. St. Paul Fire & Marine Ins. Co., 354 F. Supp. 2d 917, 922 (E.D. Ark. 2005))).

use of subcontractors for construction projects.[254] If a CGL policy covered the consequential damages of each subcontractor's faulty work, the argument goes, then it would essentially be insuring the full performance of the project.[255] Recent decisions from other jurisdictions taking this view[256] lend credence to Harleysville's argument that its CGL policy was not intended to cover the damage to the condominium project caused by the faulty workmanship of the insured's subcontractors.[257]

3. The Court Forges a Compromise

At oral argument for *Crossmann II*, the court gave signs that the *Crossmann I* decision troubled them.[258] Chief Justice Toal expressed skepticism at the proffered examples of a realistic situation in which progressive property damage resulting from a subcontractor's defective construction would be covered under *Crossmann I*.[259] Justice Beatty probed whether Harleysville could reconcile the strict fortuity element imposed in *Crossmann I* with the policy's "continuous or repeated exposure" language in the occurrence definition.[260] The court did not sound persuaded that there were realistic circumstances in which the occurrence requirement would ever be satisfied under the "continuous or repeated" language and still possess the necessary fortuity element.[261] Though the court recognized that this language broadened the meaning of the occurrence definition, the court in *Crossmann II* decided against returning to *Newman*'s express allowance of insurance coverage under that provision.[262] While Crossmann may have presented a strong argument that the condominium project's long-term exposure to the consequences of faulty workmanship constituted an occurrence, the court was not prepared to jettison the fortuity requirement, which it must have continued to see as "central to the principle of liability insurance."[263] Hence, the court "adhere[d] to the result in *Newman*," while purportedly clarifying that coverage was triggered in that case as a result of an ambiguous term being construed in the contractor's favor[264]—not directly because the water intrusion

254. *See* Shidlofsky & Wielinski, *supra* note 17, at 89.

255. *See Nabholz*, 354 F. Supp. 2d at 922 (explaining the risks covered in a performance bond versus a CGL policy).

256. SHIDLOFSKY & WIELINSKI, *supra* note 17, at 74 (citing decisions from Arkansas, Pennsylvania, Hawaii, and Kentucky).

257. *See* Crossmann Cmtys. of N.C., Inc. v. Harleysville Mut. Ins. Co. (*Crossmann II*), 395 S.C. 40, 45, 717 S.E.2d 589, 592 (2011).

258. *See* Oral Argument, *supra* note 219, at tape 1, side 2.

259. *Id.*

260. *Id.*

261. *Id.*

262. *See Crossmann II*, 395 S.C. at 48, 50, 717 S.E.2d at 593–94.

263. Shidlofsky & Wielinski, *supra* note 17, at 83.

264. *Crossmann II*, 395 S.C. at 48, 50, 717 S.E.2d at 593–94.

constituted an accident, including the "continuous or repeated exposure to substantially the same general harmful conditions."[265]

The court's conclusion that an occurrence is an ambiguous term and must be construed against the CGL insurer thus represents a reasonable compromise between the opposing results of *Newman* and *Crossmann I*.[266] The South Carolina Supreme Court is not alone in concluding the term to be ambiguous.[267] The problem with the words occurrence and accident, is that "[e]very one seems to 'know' what they mean, yet there is little judicial consensus in their application to certain factual scenarios, particularly negligent or defective construction."[268] And as the amici Associated General Contractors of America and Carolina ACG argued at the rehearing, it is incumbent upon the insurance companies, as drafters, to use clearer language.[269] Across the country, parties have spent years litigating the meaning of occurrence as used in CGL policies, and no judicial consensus has come remotely close to being reached.[270] The court clearly agreed with the amici that, instead of wasting more judicial time and resources struggling with this term, the court should simply construe it against the drafter, who was in the singular position of being able to specify the precise scope of coverage.[271] Interestingly, the New Hampshire Supreme Court in *High Country*, which the court chiefly relied upon in both *L-J* and *Newman*, determined that accident was an ambiguous term and should be construed against the insurer.[272] Considering its previous reliance on *High Country*,[273] it is puzzling that the South Carolina Supreme Court did not cite that case for the ambiguity proposition adopted in *Crossmann II*. Nonetheless, it is fitting that the court's use of the ambiguity concept is consistent with *High Country* in light of the court's invocation of that case in both *L-J* and *Newman*.

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265. *See id.* at 47, 717 S.E.2d at 592.

266. *See id.* at 50, 717 S.E.2d at 594.

267. *See, e.g.*, High Country Assocs. v. N.H. Ins. Co., 648 A.2d 474, 478 (N.H. 1994) (noting that the term "accident" is ambiguous, rendering "occurrence" ambiguous since accident is part of the definition of occurrence (citing Green Mountain Ins. Co. v. Foreman, 641 A.2d 230, 233 (N.H. 1994))).

268. Law, *supra* note 235, at 105 ("[P]erhaps the most obvious question is too often left unasked: Is the definition of 'occurrence' ambiguous?").

269. Oral Argument, *supra* note 219, at tape 2, side 1.

270. *Id.*; *see also* Mosher, *supra* note 51, at 70 ("Courts and litigators have struggled with whether a particular claim resulted from an accident, occurrence, or unexpected and unintended conduct. The practitioner is cautioned to review the law of the jurisdiction at issue—these concepts are often litigated, and holdings are disparate.").

271. *Crossmann II*, 395 S.C. at 47 n.4, 717 S.E.2d at 593 n.4 ("[I]f insurers intend to preclude this construction, it is incumbent upon them to include clear language accomplishing this result.").

272. *High Country*, 648 A.2d at 478 (citing *Green Mountain Ins. Co.*, 641 A.2d at 233); *see* Law, *supra* note 235, at 105.

273. *See supra* notes 70–73, 86–90 and accompanying text.

B. Crossmann II *Has Put South Carolina on the Minority Rule Trajectory*

The court's holding in *Crossmann II*, that the occurrence definition was ambiguous,[274] does not moot the importance of analyzing the court's precise approach because in construction defect cases "the choice of rationale employed can have a dramatic effect on the extent of coverage owed."[275] By basing its decision on the ambiguity principle, the court, in *Crossmann II*, neither repudiated the majority rule nor endorsed the minority rule discussed in *Crossmann I*.[276] However, the court's disposition of the case is more consistent with those states holding that damages flowing from defective workmanship trigger an occurrence as long as the event was neither intended nor expected by the insured. This is evident because the court (1) followed two leading minority rule jurisdictions in narrowly interpreting work product, and (2) ruled out one of the two justifications for the majority rule.[277]

1. The Court's Narrow Work Product Interpretation

Although the court withdrew *Crossmann I*, and it is not South Carolina law, principles extracted from that opinion may serve to define the parameters of CGL coverage under the *Crossmann II* framework. *Crossmann I*'s express approval of narrowly construing work product to encompass only a component part of the project[278] was employed in *Crossmann II* to determine that the damages to the condominium units consisted of something beyond the faulty workmanship.[279] This narrow work product interpretation struck a parallel chord in *Crossmann II*'s property damage analysis when the court stated that property damage has been appropriately alleged when there is a claim of damage to property that was "initially proper and injured thereafter."[280] The court cited both *United States Fire Insurance Co. v. J.S.U.B., Inc.*[281] and *Travelers Indemnity Co. of America v. Moore and Associates, Inc.*[282] for the proposition

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274. *Crossmann II*, 395 S.C. at 47, 717 S.E.2d at 592–93.

275. MANILOFF & STEMPEL, *supra* note 24, at 222.

276. *See supra* text accompanying notes 131–144. Whether the court's decision is labeled under the majority or minority approach is of no great importance as cases within each rule have various permutations, rationales, and inconsistencies. *See* Shidlofsky & Wielinski, *supra* note 17, at 74. Some have questioned whether the so-called minority rule is even truly the minority viewpoint. Law, *supra* note 235, at 111 ("[T]he majority/minority balance on this issue is always shifting, and the count remains close."). After all, "[t]he trend in the case law favors coverage, based on the view that inadvertent construction defects resulting in property damage may constitute an occurrence." Shidlofsky & Wielinski, *supra* note 17, at 73.

277. *See infra* Part V.B1–2.

278. Crossmann Cmtys. of N.C., Inc. v. Harleysville Mut. Ins. Co. (*Crossmann I*), No. 26909, Shearouse Adv. Sh. No. 1 at 48 (S.C. Jan. 7, 2011), *withdrawn*, 395 S.C. 40, 717 S.E.2d 589 (2011).

279. *Crossmann II*, 395 S.C. at 50, 717 S.E.2d at 594.

280. *Id.* at 49, 717 S.E.2d. at 593.

281. 979 So. 2d 871, 889–90 (Fla. 2007).

282. 216 S.W.3d 302, 311 (Tenn. 2007).

that there is a "difference between a claim for the costs of repairing or removing defective work, which is not a claim for property damage, and a claim for the costs of repairing damage caused by the defective work, which is a claim for property damage."[283]

While the court's statement does not directly pertain to the occurrence requirement, the distinction being drawn is important because it emphasizes whether an injurious event took place, separating the property damage from the faulty workmanship. By focusing on this separation between act and consequential result, a court would seemingly be more amenable to the argument that an insured contractor did not intend or expect damage resulting from a subcontractor's performance.[284] In addition, it is noteworthy that the court cited *J.S.U.B.* and *Moore* because they have been described as representing the "recent trend of state courts finding that physical damage resulting from inadvertent construction defects constitutes an occurrence under a CGL policy."[285] In *J.S.U.B.*, the Florida Supreme Court rejected the idea that a general contractor is presumed to intend or expect damage caused by a subcontractor's faulty workmanship where the damage is to the insured's work product.[286] The court also rejected the idea that a breach of contract is never an occurrence, stating that "there is nothing in the basic coverage language of the current CGL policy to support any definitive tort/contract line of demarcation."[287] In *Moore*, the Tennessee Supreme Court similarly rejected the insurer's argument that damages caused by a subcontractor's faulty workmanship were not covered because it was foreseeable to the insured contractor that water penetration would result from "improperly installed windows."[288] Similarly, other courts have pointed out the fallacy in making foreseeability the standard for triggering an occurrence: "Insurance premiums are based on actuarial risk. The reason why consumers buy insurance is because of foreseeable risks."[289]

On the issue of what constitutes the insured's work product, it is interesting that Justice Pleicones did not write separately in *Crossmann II* to reaffirm that work product should be defined broadly to incorporate the entire condominium project.[290] One would have expected this objection to the court's ruling that

283. *Crossmann II*, 395 S.C. at 49, 717 S.E.2d at 593 (internal quotation marks omitted).

284. *See, e.g.*, French v. Assurance Co. of Am., 448 F.3d 693, 699, 704 (4th Cir. 2006) (applying Maryland law, the court used a subjective test to determine that the insured general contractor did not expect or intend that the home's walls and structure "would suffer damage from moisture intrusion" as a result of a subcontractor's faulty application of synthetic stucco).

285. Shidlofsky & Wielinski, *supra* note 17, at 74.

286. *See* Law, *supra* note 235, at 101 (citing *J.S.U.B.*, 979 So. 2d at 883).

287. *J.S.U.B.*, 979 So. 2d at 884 (quoting Am. Family Mut. Ins. Co. v. Am. Girl, Inc., 673 N.W.2d 65, 77 (Wis. 2004)) (internal quotation marks omitted).

288. Travelers Indem. Co. of Am. v. Moore & Assocs., Inc., 216 S.W.3d 302, 308 (Tenn. 2007).

289. *See* Shidlofsky & Wielinski, *supra* note 17, at 107–08 n.32; *see, e.g.*, Lamar Homes, Inc. v. Mid-Continent Cas. Co., 242 S.W.3d 1, 8 (Tex. 2007).

290. *See* Auto Owners Ins. Co. v. Newman, 385 S.C. 187, 199–201, 684 S.E.2d 541, 547–58 (2009) (Pleicones, J., dissenting) (explaining his work product theory).

resultant damage to otherwise non-defective component parts may constitute property damage.[291] One possible explanation for Justice Pleicones siding with the majority is that he based his *Newman* dissent on the *L-J* holding that faulty workmanship that results in damage to the work product was not covered because there was no *occurrence*—not because there was no *property damage*.[292] In fact, in *Newman*, the court did not separately analyze the property damage requirement,[293] and thus, there was no occasion to consider the definition of work product within the property damage context. In contrast, *Crossmann II* separately discussed whether the damage caused by the faulty workmanship constituted property damage within the meaning of that term in a CGL policy.[294] Justice Pleicones may have thought that the property damage definition allowed for a narrow interpretation of the work product term, whereas the occurrence definition, under *L-J*'s precedent, required the broader work product interpretation. It is also possible, however, that he concluded along with the rest of the court, that the occurrence requirement was simply too ambiguous to apply in a progressive damage case, as evidenced by the continuing problems the policy term caused.

2. *The Court Rejects the Business-Risk/Tort-Risk Distinction*

Lost in *Crossmann I*'s acceptance of the fortuity element justification for the majority rule was the court's apparent rejection of the business-risk/tort-risk justification for the majority rule.[295] In that opinion, the court noted the incongruence in basing the occurrence analysis on the issue of "which property is damaged"—as the majority rule does—rather than on the nature of the damage causing event itself.[296] The court's later acknowledgment that damage to the insured's own product could potentially be covered (after a fortuitous event)[297] undermines the premise of the business-risk/tort-risk theory that damage resulting from faulty workmanship to the insured's project is an uninsurable economic loss.[298] The court's aversion to the business-risk/tort-risk theory was manifested in *Crossmann II*. In that opinion, the court could have held that there was no occurrence because the possibility of damage to the condominium units

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291. Crossmann Cmtys. of N.C., Inc. v. Harleysville Mut. Ins. Co. (*Crossmann II*), 395 S.C. 40, 48–50, 717 S.E.2d 589, 593–94 (2011).

292. *Newman*, 385 S.C. at 199, 684 S.E.2d at 547 (2009) (Pleicones, J., dissenting) (citing L-J, Inc. v. Bituminous Fire & Marine Ins. Co., 366 S.C. 117, 123, 621 S.E.2d 33, 36 (2005)).

293. *Id.* at 191–94, 684 S.E.2d at 543–45 (2009) (majority opinion) (discussing property damage in the context of an occurrence).

294. *Crossmann II*, 395 S.C. at 48–59, 717 S.E.2d at 593–94.

295. *See supra* text accompanying notes 132–135.

296. Crossmann Cmtys. of N.C., Inc. v. Harleysville Mut. Ins. Co. (*Crossmann I*), No. 26909, Shearouse Adv. Sh. No. 1 at 38 & n.5, 41 (S.C. Jan. 7, 2011), *withdrawn*, 395 S.C. 40, 717 S.E.2d 589 (2011).

297. *See id.* at 49.

298. *See* Shidlofsky & Wielinski, *supra* note 17, at 80 (explaining the business risk concept).

represented the business risk that the insured's product would not meet the project's contract specifications, and thus the contractor would simply be liable in contract. Instead, however, after deciding that it was ambiguous whether the continuous moisture intrusion possessed the necessary fortuity component, the lack of which justifies finding no occurrence under the majority rule, the court held that coverage existed for the property damage.[299]

Of course, the court's rejection of this distinction between contract risk and tort risk does not mean that it will jettison the fortuity requirement. However, it arguably negates one of the major bases courts employ for denying coverage for damages arising out of faulty workmanship: that allowing coverage would improperly convert the CGL policy into a performance bond.[300] The performance bond argument provides that damage to the insured's work product caused by faulty workmanship is not covered by a CGL policy that insures only fortuitous risks; instead, it would be properly covered by a performance bond that guarantees the performance of the specifications of the underlying construction contract.[301] The premise of this argument is that there is a distinction between the risk of property damage or bodily injury and the risk that the contractor will default on his obligations.[302] This distinction is similarly made in the business-risk/tort-risk justification for the majority rule.[303] Because the *Crossmann II* opinion is inconsistent with the business-risk/tort-risk theory, it would seem that the court would be reluctant to further embrace the performance bond argument where damage exists beyond the faulty workmanship.

Interestingly, in *Crossmann I*, the court stated that courts using the business-risk/tort-risk justification generally "first address whether there has been property damage" and courts using the fortuity justification "first address whether there has been an occurrence."[304] The court later adhered to that statement by analyzing first whether the occurrence requirement was satisfied.[305] In *Crossmann II*, however, the court switched the order of its analysis, expressly stating that the property damage inquiry must be conducted first and the occurrence inquiry second.[306] The significance of this change is unknown; however, it is interesting that the *Crossmann II* analytical framework is the opposite of the framework explicitly mentioned in *Crossmann I* as being used by

299. *Crossmann II*, 395 S.C. at 50, 717 S.E.2d at 594.

300. *See* Shidlofsky & Wielinski, *supra* note 17, at 81.

301. *See* Law, *supra* note 235, at 106.

302. *See* Shidlofsky & Wielinski, *supra* note 17, at 81–82.

303. *See* Savrin & Surden, *supra* note 39, at 43.

304. Crossmann Cmtys. of N.C., Inc. v. Harleysville Mut. Ins. Co. (*Crossmann I*), No. 26909, Shearouse Adv. Sh. No. 1 at 39–40 (S.C. Jan. 7, 2011) (internal quotation marks omitted), *withdrawn*, 395 S.C. 40, 717 S.E.2d 589 (2011).

305. *Id.* at 46.

306. Crossmann Cmtys. of N.C., Inc. v. Harleysville Mut. Ins. Co. (*Crossmann II*), 395 S.C. 40, 49, 717 S.E.2d 589, 594 (2011).

those courts that reason property damage caused by faulty workmanship "does not possess any element of fortuity . . . and, therefore, [is] not accidental."[307]

C. The Effect of S.C. Code Ann. § 38-61-70

The implications of *Crossmann II* must be considered in light of the legislation that the South Carolina General Assembly passed in the wake of *Crossmann I*.[308] For purposes of construction related work, this statute defines an occurrence in a CGL policy as "(1) an accident, including continuous or repeated exposure to substantially the same general harmful conditions; and (2) *property damage or bodily injury resulting from faulty workmanship, exclusive of the faulty workmanship itself.*"[309] This statute, the result of intense lobbying from segments of the legal and business communities, intended to override the result in *Crossmann I*[310] and attempted to foreclose the courts from reading the fortuity component into the occurrence definition.[311]

By its terms, the statute retroactively applies to pending and future disputes over CGL policies already in existence.[312] However, at oral argument, Chief Justice Toal immediately rejected Crossmann's opening request that the court align its holding with the goal of the newly passed statute.[313] Additionally, the court stated in *Crossmann II* that it would not apply, ex post facto, a statute designed to dictate the "construction [of an] existing insurance polic[y]" pending in the judicial system.[314] The court's nondeferential stance on the statute may have presaged the law's own vulnerability—it is currently under constitutional attack in a lawsuit filed in the South Carolina Supreme Court under the court's original jurisdiction.[315] Harleysville brought this lawsuit, alleging that the statute violates both the Contracts Clause of the U.S. Constitution by impairing insurance contracts already in existence, [316] and the Separation of Powers Clause of the South Carolina Constitution[317] by legislative encroachment on the judicial branch of government.[318]

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307. *Crossmann I*, Shearouse Adv. Sh. No. 1 at 40.

308. S.C. CODE ANN. § 38-61-70 (Supp. 2011).

309. *Id.* § 38-61-70(B)(1)–(2) (emphasis added).

310. *See* Frampton, *supra* note 12.

311. *See id.*

312. § 38-61-70(E).

313. Oral Argument, *supra* note 219, tape 1, side 1; *see* Michael Ethridge, *What Happened at the Crossmann Communities Rehearing?*, CARLOCK COPELAND INS. COVERAGE CORNER (June 2, 2011), http://www.insurancecoveragecorner.com/occurrence/what-happened-at-the-crossmann-communities-rehearing-1/.

314. Crossmann Cmtys. of N.C., Inc. v. Harleysville Mut. Ins. Co. (*Crossmann II*), 395 S.C. 40, 50 n.6, 717 S.E.2d 589, 594 n.6 (2011).

315. Complaint at 6–13, Harleysville Mut. Ins. Co. v. State (S.C. May 23, 2011), *available at* http://insurancecoveragecorner.com/complaint.pdf.

316. Complaint, *supra* note 315, at 8–10 (citing U.S. CONST. art. I, § 10, cl. 1).

317. Complaint, *supra* note 315, at 6–8 (citing S.C. CONST. art. I, § 8).

318. Complaint, *supra* note 315, at 7; COASTAL CONTRACTOR ONLINE, *supra* note 2.

If the statute survives this constitutional challenge, the court will have to determine its continuing effect in future coverage disputes. One South Carolina practitioner suggests that *Crossmann II* diminished the significance of the legislation because the court's opinion achieved the goal of the statute: "A determination that damage arising from faulty workmanship, with the exception of the faulty work itself, is an occurrence."[319] One possible issue with the statute's language is that the definition of an occurrence now includes "property damage . . . resulting from faulty workmanship."[320] A strict reading of that phrase reveals a potential problem—property damage itself is never an occurrence; rather, property damage may *result* from an occurrence.[321] Courts may understand this statutory provision to mean that the occurrence requirement is satisfied where faulty workmanship directly causes property damage. However, the supreme court in *Crossmann II* specifically delineated that the property damage and occurrence requirements were to be analyzed separately.[322] Therefore, the lower courts must follow the two-step legal framework for determining whether CGL coverage exists in construction defect lawsuits. While it is possible that insurance companies will tweak the language of their CGL policies in response to the court's ruling, that result may achieve the court's overall goal in deeming the occurrence term ambiguous: force the insurance companies to use clearer language in expressing the party's intentions.[323] Indeed, "the insurance industry is constantly changing and revising policy language in reaction to construction industry changes as well as to court decisions interpreting and applying the language of insurance policies."[324]

VI. CONCLUSION

The South Carolina Supreme Court's decision that a CGL policy's occurrence definition lacks clear meaning has, ironically, brought greater clarity to this contentious area of the law. The supreme court's two prong legal test separating the property damage and occurrence questions will provide guidance to trial judges and parties litigating CGL coverage in construction cases. Damage to the insured contractor's otherwise nondefective work product as a result of a subcontractor's faulty workmanship will likely be covered as long as no policy exclusions apply; however, the costs of repairing or replacing the defective work itself will not be covered. This prognosis is supported by the

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319. Nichols, *supra* note 4, at 30 n.3.

320. S.C. CODE ANN. § 38-61-70(B)(2) (Supp. 2011).

321. Shidlofsky & Wielinski, *supra* note 17, at 72 ("[P]roperty damage [is] caused by an occurrence.").

322. Crossmann Cmtys. of N.C., Inc. v. Harleysville Mut. Ins. Co. (*Crossmann II*), 395 S.C. 40, 49, 717 S.E.2d 589, 594 (2011).

323. *Id.* at 47 n.4, 717 S.E.2d at 593 n.4 (urging insurers to use clearer language to accomplish their intended result).

324. SMITH, CURRIE & HANCOCK'S COMMON SENSE CONSTRUCTION LAW: A PRACTICAL GUIDE FOR THE CONSTRUCTION PROFESSIONAL, *supra* note 135, at 524.

intent of S.C. Code Ann. § 38-61-70—should this statute overcome its constitutional challenge—as it also distinguishes between damages arising from faulty workmanship and any costs for repair or replacement.[325]

An insured contractor seeking insurance coverage for property damage caused by a subcontractor's negligence must be able to assert facts that meet the standard of a reasonable interpretation of the occurrence requirement. A court will not construe the occurrence term in favor of the insured contractor if the event giving rise to the coverage claim cannot reasonably be deemed "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."[326] Nonetheless, given the inherent uncertainty in litigating over a term deemed ambiguous, the South Carolina Supreme Court may have delivered the strongest incentive yet for insurance companies to use clearer language.

John C. Bruton

325. § 38-61-70(B)(1)–(2).
326. § 38-61-70(B)(1).

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